



FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1002, 1011, 1108, 1109, 1111, and 1115

[Docket No. EP 699]

Assessment of Mediation and Arbitration Procedures

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board or STB) proposes regulations that would require parties to participate in mediation in certain types of cases and would modify its existing regulations that permit parties to engage voluntarily in mediation.

The Board also proposes an arbitration program under which carriers and shippers would agree voluntarily to arbitrate certain types of disputes that come before the Board, and proposes modifications to clarify and simplify its existing rules governing the use of arbitration in other disputes. The Board seeks comments regarding these proposed rules.

DATES: Comments are due by May 17, 2012. Replies are due June 18, 2012.

ADDRESSES: Comments, information, or questions regarding this proposed rule should reference Docket No. EP 699 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at 202-245-0391.

[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible.¹ To that end, the Board has existing rules that encourage parties to agree voluntarily to mediate or arbitrate certain matters subject to its jurisdiction. The Board's mediation rules are set forth at 49 C.F.R. §§ 1109.1, 1109.3, 1109.4, 1111.2, 1111.9, and 1111.10. Its arbitration rules are set forth at 49 C.F.R. §§ 1108, 1109.1, 1109.2, 1109.3, and 1115.8. In a decision served on August 20, 2010,² and published in the Federal Register on August 24, 2010,³ the Board sought input regarding measures it might implement to encourage or require greater use of mediation, and to encourage greater voluntary use of arbitration, including making changes to the Board's existing rules and establishing new rules. The Board also sought input regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint. The Board served a subsequent notice in this matter on December 3, 2010,⁴ to clarify that any comments filed by the Railroad-Shipper Transportation Advisory Council (RSTAC) would be accorded the same weight as other

¹ Mediation is a process in which parties attempt to negotiate an agreement that resolves some or all of the issues in dispute, with the assistance of a trained, neutral, third-party mediator. Arbitration, by comparison, is an informal evidentiary process conducted by a trained, neutral, third-party arbitrator with expertise in the subject matter of the dispute. By agreeing to participate in arbitration, the parties agree to be bound (with limited appeal rights) by the arbitral decision.

² Assessment of Mediation and Arbitration Procedures, EP 699 (STB served Aug. 20, 2010).

³ Assessment of Mediation and Arbitration Procedures, 75 Fed. Reg. 52,054.

⁴ Id., EP 699 (STB served Dec. 3, 2010).

comments in developing any new rules.⁵ The modifications to the Board's rules proposed in this decision are intended to increase the use of mediation and arbitration in lieu of formal adjudication to resolve disputes before the Board.

The proposed changes to the existing mediation rules would establish procedures under which the Board could compel mediation in certain types of adjudications before the Board, on a case-specific basis, as well as to grant mediation requests of parties to disputes.⁶ As is the current practice, the Board would assign staff from its Rail Customer and Public Assistance (RCPA) program, who are trained mediators, to conduct the mediation process. Mediation periods would last up to 30 days, and could be extended upon the mutual request of the parties. The Board would reserve the right to stay underlying proceedings and toll any applicable statutory deadlines. The Board believes that the proposed mediation rules would be in the public interest. If a dispute is amicably resolved, the parties could do so at considerably less expense and in less time than if they used the Board's formal adjudicatory process, and could better preserve their ongoing commercial relationship.

The proposed changes to the Board's arbitration rules are intended to consolidate the separate arbitration procedures in Parts 1108 and 1109, to encourage greater use of

⁵ RSTAC is an advisory board established by Federal law to advise the U.S. Congress, the U.S. Department of Transportation, and the Board on issues related to rail transportation policy, with particular attention to issues of importance to small shippers and small railroads. By statute, RSTAC members are appointed by the Board's chairman. Representatives of large and small rail customers, Class I railroads, and small railroads sit on RSTAC. The Board's members and the U.S. Secretary of Transportation are ex officio, nonvoting RSTAC members. (49 U.S.C. § 726.)

⁶ The Board's authority to revise its mediation rules exists under 49 U.S.C. § 721(a) and under the Alternative Dispute Resolution Act, 5 U.S.C. §§ 571-584.

arbitration to resolve disputes before the Board by simplifying the process, and by clarifying the types of disputes that may be submitted for arbitration.⁷ Moreover, the Board proposes establishing an “arbitration program” to cover a subset of arbitrable disputes, in which rail carriers may voluntarily participate. The Board believes that the proposed arbitration program would provide value to both carriers and shippers, because disputes can be resolved through arbitration in a more timely and less adversarial fashion than through the Board’s formal adjudicatory processes, and arbitration could help the parties to preserve their commercial relationship. It likewise would allow carriers more flexibility in resolving customer-specific disputes because resolution would be confidential and nonprecedential, unless the arbitrator’s decision is appealed.

Under the arbitration program, rail carriers would agree, in advance, to submit to binding arbitration certain defined types of disputes, such as complaints related to demurrage and accessorial charges, or the misrouting or mishandling of rail cars, where the complainant seeks monetary damages for past harm, not for injunctive or prospective relief. The Board also proposes to limit the relief that an arbitrator could award to no more than \$200,000, plus interest. Commenters are invited to suggest a different dollar cap that they believe would better capture the majority of such disputes that would be best resolved through arbitration. Arbitration under the arbitration program would be mandatory for the carrier either where the dispute involves only carriers that are participants in the Board’s arbitration program, or where the dispute involves at least one carrier-participant and all other parties to the dispute consent to arbitration pursuant to the

⁷ The Board has authority to revise its arbitration rules under 49 U.S.C. § 721(a).

arbitration program.

In addition, the proposed rules provide for arbitration of most other types of adjudicatory disputes before the Board where all parties agree, on a case-by-case basis, to participate in binding arbitration. In all arbitrations, the Board would assign an arbitrator from a roster of eligible arbitrators, or could grant a mutual request from the parties to use a particular arbitrator, whether listed on the roster or not.

The proposed mediation and arbitration rules would not be available, however, to resolve any matter in which the Board is statutorily required to determine the public convenience and necessity (PCN). Thus, these procedures would not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption related to these matters. Should participants in such matters, however, reach a voluntary agreement resolving certain issues pertaining to a license or authorization proceeding, the Board would give due consideration to that resolution in weighing the PCN. These rules would also not be available to arbitrate a labor protection dispute, which has its own procedures; however, voluntary mediation of such disputes under the proposed rules would be available.

Additional information is contained in the Board's decision. The full decision is available on the Board's website at "WWW.STB.DOT.GOV."

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of

the proposed rules will be published in the Federal Register.

2. Comments regarding these proposed rules are due by May 17, 2012. Replies are due by June 18, 2012.

3. This decision is effective on the day of service.

List of Subjects

49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies)

49 CFR Part 1108

Administrative practice and procedure, Railroads

49 CFR Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, Railroads

49 CFR Part 1111

Administrative practice and procedure, Investigations

49 CFR Part 1115

Administrative practice and procedure

Decided: March 28, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig

Clearance Clerk

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002, 1011, 1108, 1109, 1111, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002 – FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721.

Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by revising paragraph (f)(87) and by removing and reserving paragraph (f)(88) to read as follows:

1002.2 Filing fees.

* * * * *

(f) * * *

Type of proceeding	Fee
* * * * *	
Part VI: Informal Proceedings	
* * * * *	
(87) Basic fee for STB adjudicatory services not otherwise covered	\$250.
(88) [Reserved]	
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PART 1011 – BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

3. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 11123, 11124, 11144, 14122, and 15722.

4. Amend § 1011.7 by adding paragraphs (a)(2)(xvii), (a)(2)(xviii) and (a)(2)(xix) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) * * *

(2) * * *

(xvii) To authorize parties to a proceeding before the Board, upon mutual request, to participate in meditation with a Board-appointed mediator, for a period of up to 30 days.

(xviii) To authorize a proceeding held in abeyance while mediation procedures are pursued, pursuant to a mutual request of the parties to the matter.

(xix) To order arbitration of program-eligible matters under the Board's regulations at 49 CFR Part 1108, or upon the mutual request of parties to a proceeding before the Board.

* * * * *

**PART 1108 – ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE
STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION
BOARD**

5. The authority citation for part 1011 continues to read as follows:

Authority: 49 U.S.C. 721(a).

6. Revise § 1108.1 to read as follows:

§ 1108.1 Definitions.

As used in this part:

(a) *Arbitration program* means a program established by the Surface Transportation Board under which participating rail carriers have agreed voluntarily in advance to resolve certain types of disputes brought before the Board using the Board's arbitration procedures.

(b) *Arbitration program-eligible matters* are those disputes, or components of disputes, that may be resolved using the Board's arbitration program and include disputes involving one or more of the following subjects: demurrage, accessorial charges; misrouting or mishandling of rail cars; disputes involving a carrier's published rules and practices as applied to particular rail transportation; and other service-related matters.

(c) *Arbitrator* means an arbitrator appointed pursuant to these rules.

(d) *Interstate Commerce Act* means the Interstate Commerce Act as amended by the ICC Termination Act of 1995.

(e) *STB* or *Board* means the Surface Transportation Board.

(f) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

7. Amend § 1108.2 by revising paragraph (b) and removing paragraph (d) to read as follows:

§ 1108.2 Statement of purpose, organization, and jurisdiction.

* * * * *

(b) These procedures shall be available for use in the resolution of all matters arbitrated before the Board, other than matters involving labor protective conditions,

which are subject to different rules. These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters.

* * * * *

8. Revise § 1108.3 to read as follows:

§ 1108.3 Matters subject to arbitration.

(a) *Use of arbitration.*

(1) *Arbitration program-eligible matters.* The Board shall assign to arbitration all arbitration program-eligible matters arising in a docketed proceeding where all parties to the proceeding are participants in the Board's arbitration program, or where one or more parties to the matter are participants in the Board's arbitration program, and all other parties to the proceeding request or consent to arbitration.

(2) *Matters partially arbitration program-eligible.* Where the issues in a proceeding before the Board relate in part to arbitration program-eligible matters, only those parts of the dispute related to arbitration program-eligible matters may be arbitrated pursuant to the arbitration program, unless the parties petition the Board in accordance with paragraph (a)(3) of this section to include non-arbitration program-eligible matters.

(3) *Other matters.* Parties may petition the Board, on a case-by-case basis, to assign to arbitration disputes, or portions of disputes, that do not relate to arbitration program-eligible matters, other than matters in which the Board is statutorily required to determine the public convenience and necessity and those involving labor protective conditions.

(4) *Mutual agreement required.* The Board will not assign to arbitration any dispute in which one or more parties is not a participant in the Board's arbitration program and does not otherwise consent to arbitration.

(b) *Participation in the Board's arbitration program.*

(1) *Class I and Class II rail carriers.* Class I and Class II rail carriers are deemed to have agreed in advance to participate in the Board's arbitration program, unless they have opted out of the program. To opt out, a Class I or Class II carrier shall do either of the following:

(i) File a notice, under docket number EP 699, informing the Board of its opt-out decision no later than 20 days following the effective date of these rules, and subsequently, no later than January 10 (or the immediately following business day) of each calendar year. Such notice shall take effect immediately.

(ii) File a notice with the Board, under docket number EP 699, at any time. Such notice shall take effect 90 days after filing and shall not excuse the filing carrier from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration program-eligible dispute associated with any matter pending before the Board at any time within the 90-day period before the opt-out notice takes effect. Class I and Class II rail carriers that opt out of the arbitration program will be deemed to be participants in the program in subsequent years if they do not file a new notice with the Board each year. A carrier that has opted out of the arbitration program may opt into the arbitration program at any time by notifying the Board. Opt-in notices shall take effect immediately.

(2) *Class III rail carriers.* A Class III rail carrier may participate in the Board's

arbitration program by filing a written notice with the Board under docket number EP 699, advising the Board of its intent to participate in the program. Such notice may be filed at any time and shall take effect immediately. A participating Class III carrier shall remain a participant in the Board's arbitration program thereafter, unless it files a notice with the Board under docket number EP 699, advising the Board of its intent to cease participation in the arbitration program. Such notice shall take effect 90 days after filing and shall not excuse the filing carrier from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration program-eligible dispute associated with any matter pending before the Board at any time within the 90-day period before the opt-out notice takes effect.

(3) *Shippers and other parties.* Shippers and other parties may participate in arbitration-program eligible arbitrations on a case-by-case basis by filing notice with the Board. Such notice shall be filed under the docket number assigned to the proceeding, indicating agreement to participate in arbitration.

(c) *Arbitrator's authority.* In resolving any dispute subject to the Board's arbitration procedures, the arbitrator shall not be bound by any procedural rules or regulations adopted by the STB for the formal resolution of similar disputes, except as specifically provided in this Part 1108. The arbitrator, however, shall be guided by the Interstate Commerce Act and by STB and ICC precedent.

(d) *Arbitration clauses.* Nothing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

9. Amend § 1108.4 by revising paragraphs (a)(1) and (a)(2) and removing

paragraph (b) to read as follows:

§ 1108.4 Relief.

(a) * * *

(1) Monetary damages, to the extent available under the Interstate Commerce Act, shall be available through the arbitration. In disputes arbitrated pursuant to the Board's arbitration program, damages shall not exceed \$200,000, exclusive of interest at a reasonable rate to be specified by the arbitrator. Participants in the Board's arbitration program shall not be obligated to arbitrate any dispute in which the alleged damages exceed \$200,000.

(2) No prospective or injunctive relief shall be available through the Board's arbitration program, or through any other arbitration before the Board.

* * * * *

10. Revise § 1108.5 to read as follows:

§ 1108.5 Fees and costs.

When parties use the Board's arbitration procedures to resolve a dispute, the party filing the complaint shall pay the applicable filing fee pursuant to 49 CFR Part 1002. The Board shall pay any fees and/or costs charged by the arbitrator, except where parties agree to use an arbitrator not included on the roster of arbitrators maintained by the Board, as described in § 1108.6(a), in which case the parties shall share the fees and/or costs of the arbitrator.

11. Revise § 1108.6 to read as follows:

§ 1108.6 Arbitrators.

(a) Arbitration shall be conducted by a single arbitrator selected, as provided

herein, from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. The roster of arbitrators shall be established by the Chairman of the STB with input from interested parties who may nominate individuals for inclusion on the list. The roster shall thereafter be maintained and updated by the Chairman of the STB on an every other year basis. The roster may also be augmented or revised at any time, and interested parties are encouraged to nominate qualified individuals for addition to the list. The roster shall be available to the public, upon request, and shall be posted on the Board's website at www.stb.dot.gov.

(b) Matters arbitrated under these rules shall be resolved by a single neutral arbitrator, selected by the Board, from the roster of qualified arbitrators. If the parties to an arbitration proceeding mutually agree upon an arbitrator (whether listed on the roster or not) to resolve their dispute, they may petition the Board to appoint that arbitrator to the arbitration proceeding.

(c) If, at any time during the arbitration process, a selected arbitrator becomes incapacitated, unwilling, or unable to fulfill his/her duties, or if all parties agree that the arbitrator should be replaced, a replacement arbitrator will be selected promptly under the process set forth in paragraphs (a) and (b) of this section.

12. Revise § 1108.7 to read as follows:

§ 1108.7 Arbitration commencement procedures.

(a) Each arbitration under these rules shall commence with a written complaint, which shall be filed and served in accordance with Board rules contained at Part 1104. Each complaint must contain a statement that the complainant is a participant in the

Board's arbitration program pursuant to §1108.3(b), or that the complainant is willing to arbitrate voluntarily all or part of the dispute pursuant to the Board's arbitration procedures. Following the filing of a complaint whose subject matter is arbitration program-eligible, the Board shall issue a notice advising other parties of whether any carrier-parties to the matter are participants in the arbitration program.

(b) Any respondent must, within 20 days of the date of the filing of a complaint, answer the complaint. The answer must state whether the respondent is a participant in the Board's arbitration program, or whether the respondent is willing to arbitrate on a voluntary basis. Where the respondent agrees to arbitrate voluntarily, the answer must identify those issues contained in the complaint that the respondent is willing to resolve through arbitration. The answer must also identify any issues contained in the complaint that the respondent is not willing to resolve through arbitration. If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis. Where the respondent is a participant in the Board's arbitration program, the answer should further state that the respondent has thereby agreed to use arbitration to resolve all of the arbitration program-eligible issues in the complaint. The Board will then set the matter for arbitration, if appropriate, and assign an arbitrator.

13. Revise § 1108.8 to read as follows:

§ 1108.8 Arbitration procedures.

The arbitrator shall establish all rules for each arbitration proceeding, including with regard to discovery, the submission of evidence and the treatment of confidential

information, subject to the requirements that the evidentiary process shall be completed within 90 days from the start date established by the arbitrator, and that the arbitrator's decision will be issued within 30 days following completion of the evidentiary phase.

14. Revise § 1108.9 to read as follows:

§ 1108.9 Decisions.

(a) Decisions of the arbitrator shall be in writing and shall contain findings of fact and conclusions.

(b) The arbitrator simultaneously shall serve a copy of the decision on the parties and upon the Board. The arbitrator may serve the decision via any service method permitted by the Board's regulations that is consistent with protecting the confidentiality of the decision, if so requested by the parties.

(c) By arbitrating pursuant to these procedures, each party agrees that the decision and award of the arbitrator shall be binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB, as provided below.

15. Revise § 1108.11 to read as follows:

§ 1108.11 Enforcement and appeals.

(a) A party may petition the Board to modify or vacate an arbitral award. The appeal must be filed within 20 days of service of a final arbitration decision, and is subject to the page limitations of § 1115.2(d) of this chapter. Copies of the appeal shall be served upon all parties in accordance with the Board's rules at Part 1104. The appealing party shall also serve a copy of its appeal upon the arbitrator. Replies to such appeals shall be filed within 20 days of the filing of the appeal with the Board, and shall

be subject to the page limitations of § 1115.2(d) of this chapter.

(b) The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(c) The STB will review, and may modify or vacate, an arbitration award, in whole or in part, only on grounds that such award reflects a clear abuse of arbitral authority or discretion.

16. Revise Part 1109 to read as follows:

PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

Sec.

1109.1 Mediation.

1109.2 Commencement of mediation.

1109.3 Mediation procedures.

1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

Authority: 5 U.S.C. 571 *et seq.*

§ 1109.1 Mediation.

Parties may seek to resolve a dispute brought before the Board using the Board's mediation procedures. These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters. The Board may, by its own order, direct the parties to participate in mediation using the Board's mediation procedures.

§ 1109.2 Commencement of mediation.

(a) *Availability of mediation.* Mediation may be commenced in a dispute before the Board:

(1) Pursuant to a Board order issued in response to a written request of one or more parties to a matter;

(2) Where the Board orders mediation by its own order; or

(3) In connection with a rate complaint, as provided by § 1109.4 and Part 1111 of this chapter.

(b) *Requests for mediation.* Parties wishing to pursue mediation may file a request for mediation with the Board at any time following the filing of a complaint. Parties that use Board mediation procedures shall not be required to pay any fees other than the appropriate filing fee associated with the underlying dispute, as provided at 49 CFR 1002.2. The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where a mediation request is not submitted by all parties to a matter.

§ 1109.3 Mediation procedures.

(a) The Board will appoint a Board employee, who is a qualified mediator, to facilitate any dispute assigned for mediation. Alternatively, the parties to a matter may agree to use a non-Board mediator if they so inform the Board within 10 days of an order assigning the dispute to mediation. If a non-Board mediator is used, the parties shall share the fees and/or costs of the mediator. The following restrictions apply to any mediator selected by the Board or the parties:

(1) No person may serve as a mediator who has previously served as an advocate or representative, in any matter, for any party to the mediation;

(2) No person serving as a mediator may thereafter serve as an advocate for a party in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a party to the mediation before any other federal court or agency; and

(3) If the mediation does not fully resolve all issues before the Board, the person serving as a mediator may not thereafter advise the Board regarding the future disposition of the dispute.

(b) Parties shall have 30 days from the date of the first mediation session to reach a settlement agreement, or to narrow the issues in dispute, or to agree to stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. The mediator may assist the parties in preparing a settlement agreement. The mediator shall notify the Board whether the parties have reached any agreement by the end of the 30-day period.

(c) Any settlement agreement reached during or as a result of mediation must be in writing, and signed by all parties to the mediation. The parties need not provide a copy of the settlement agreement to the Board, or otherwise make the terms of the agreement public, provided that the parties, or the mediator, notify the Board that the parties have reached a mutually agreeable resolution, and request that the Board terminate the underlying Board proceeding. Parties to the settlement agreement shall waive all appeal rights as to the issues resolved by the settlement agreement.

(d) If the parties reach only a partial resolution of their dispute, they or the mediator shall so inform the Board, and the parties shall file any stipulations they have mutually reached, and ask the Board to reactivate the procedural schedule in the

underlying proceeding to decide the remaining issues.

(e) The Board may extend mediation for additional periods of time not to exceed 30 days per period, pursuant to mutual written requests of all parties to the proceeding. The Board will not extend mediation for additional periods of time where one or more parties to a matter do not agree to an extension. The Board will not order mediation more than once in any particular proceeding, but may permit it if all parties to a matter mutually request another round of mediation.

(f) Mediation is a confidential process except for those limited exceptions permitted by the Administrative Dispute Resolution Act at 5 U.S.C. 574.

(1) All notes taken by participants (including but not limited to the mediator, parties, and their representatives) during the mediation must be destroyed following the conclusion of the matter subject to mediation. As a condition of participation, the parties and any interested parties joining the mediation must agree to the confidentiality of the mediation process. The parties to mediation, including the mediator, shall not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the settlement agreement with the consent of all parties, except as required by law.

(2) Evidence of conduct or statements made during mediation are not admissible in any Board proceeding. However, if mediation fails to result in a full resolution of the dispute, evidence that is otherwise discoverable may not be excluded from introduction into the record of the underlying proceeding merely because it was presented during mediation. Such materials may be used if they are disclosed through formal discovery procedures established by the Board or other adjudicatory body.

(g) Except as otherwise provided for in 49 CFR 1109.4(f) and Part 1111, the mutual request of all parties that a proceeding be held in abeyance while mediation procedures are pursued should be submitted to the Chief, Section of Administration, Office of Proceedings. The Board shall promptly issue an order in response to such requests. Except as otherwise provided for in 49 CFR 1109.4(f) and Part 1111, the Board may also direct that a proceeding be held in abeyance pending the conclusion of mediation. The period while any proceeding is held in abeyance to facilitate mediation shall not be counted toward any applicable statutory deadlines.

§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111.

(b) Within 10 business days after the shipper files its formal complaint, the Board will assign a mediator to the case. Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve

the dispute. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party.

(e) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(f) Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in stand alone cost rate cases, set forth at 49 CFR 1111.8(a).

PART 1111 – COMPLAINT AND INVESTIGATION PROCEDURES

17. The authority citation for part 1111 continues to read as follows:

Authority: 49 U.S.C. 721, 10704, and 11701.

18. Amend § 1111.10 by revising paragraph (b) to read as follows:

§ 1111.10 Meeting to discuss procedural matters.

* * * * *

(b) *Simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on the simplified standards, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the mediation period ends. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so,

the nature of such disputes.

PART 1115 – APPELLATE PROCEDURES

19. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

20. Revise § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

An appeal of right is permitted. The appeal must be filed within 20 days of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). The standard of review will be whether there is a showing of a clear abuse of arbitral authority or discretion. The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f).

[FR Doc. 2012-7836 Filed 03/30/2012 at 8:45 am; Publication Date: 04/02/2012]